

# Florida State University Journal of Land Use and Environmental Law

Volume 8

Number 2 *Spring 1993*

Article 1

April 2018

## Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council

Daniel R. Mandelker

*Washington University in St. Louis*

Follow this and additional works at: <https://ir.law.fsu.edu/jluel>



Part of the [Constitutional Law Commons](#), [Environmental Law Commons](#), and the [Property Law and Real Estate Commons](#)

### Recommended Citation

Mandelker, Daniel R. (2018) "Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council," *Florida State University Journal of Land Use and Environmental Law*: Vol. 8 : No. 2 , Article 1.

Available at: <https://ir.law.fsu.edu/jluel/vol8/iss2/1>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Land Use and Environmental Law by an authorized editor of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

---

# Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council

## **Cover Page Footnote**

This article is based on a speech delivered as the 1992 Distinguished Lecture, Florida State University Journal of Land Use and Environmental Law. For additional commentary on Lucas by the author, see The Case of the Curious Case, Land Use L. & Zoning Dig., Sept. 1992, at 3. The author thanks Professor Richard Lazarus for comments on an earlier draft of this article.

OF MICE AND MISSILES: A TRUE ACCOUNT OF  
LUCAS V. SOUTH CAROLINA COASTAL COUNCIL

DANIEL R. MANDELKER\*

"Today the Court launches a missile to kill a mouse."  
Justice Blackmun, dissenting<sup>1</sup>

In its 1991-92 Term, the Supreme Court appeared to enter the "Year of the Taking Clause." Its 1987 trilogy<sup>2</sup> of taking cases raised more questions than it answered,<sup>3</sup> so when the Court took two new cases<sup>4</sup> it was expected that clarity, if not substance, would issue from Delphi, and that the Court might resolve the taking clause puzzle.

Nothing of the sort happened. The Court, instead, raised troublesome questions by confusing the distinction between two taking tests it applies to land use regulations. The first is a pragmatic balancing test based on several factors courts are to consider in their taking decisions.<sup>5</sup> The second test is actually a set of taking rules. One of these rules, confirmed in the Court's important 1987 trilogy of taking cases,<sup>6</sup> is a two-part taking rule. It finds a taking if a land use regulation does not serve a legitimate governmental purpose, or leaves a landowner without an economically viable use of his land.<sup>7</sup> A second taking rule is a categorical per se rule. Land use regulations falling under this rule are held absolutely to be a

\* Stamper Professor of Law, Washington University in St. Louis. This article is based on a speech delivered as the 1992 Distinguished Lecture, Florida State University Journal of Land Use and Environmental Law. For additional commentary on *Lucas* by the author, see *The Case of the Curious Case*, LAND USE L. & ZONING DIG., Sept. 1992, at 3. The author thanks Professor Richard Lazarus for comments on an earlier draft of this article.

1. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2904 (1992).

2. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

3. This is clear from the outpouring of commentary on these decisions. For the author's thoughts, see Daniel R. Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, LAND USE L. & ZONING DIG., Nov. 1988, at 3.

4. *Yee v. City of Escondido*, 112 S. Ct. 1522 (1992); *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

5. The Court adopted this test in *Penn Central Transp. Corp. v. City of New York*, 438 U.S. 104 (1978).

6. See *supra* note 2.

7. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987).

taking and pragmatic case-by-case balancing is not required. Only land use regulations that authorize a physical occupation of land fell within the per se category prior to *Lucas*.<sup>8</sup> The first 1992 decision, *Yee v. City of Escondido*,<sup>9</sup> considered how far the physical taking category should extend. The Court held that laws restricting tenant evictions and limiting rent increases in mobile home parks were not a per se taking because these limitations on an owner's control of his property are not the same as a physical occupation.<sup>10</sup> The second 1992 decision, *Lucas v. South Carolina Coastal Council*, provided mixed signals on the role of per se rules and case-by-case balancing under the taking clause.<sup>11</sup> The principal contribution of *Lucas* is a new per se taking rule that retains elements of pragmatic balancing as an exception.<sup>12</sup>

*Lucas* did not have to be a per se taking case. It appeared to raise the longstanding but never-resolved question of how the Court should apply the taking clause when a land use regulation concentrates its restrictions on an owner of property to secure widespread public benefit.<sup>13</sup> This question is especially critical in environmental land use regulation. Many of these regulations, such as wetlands regulation,<sup>14</sup> restrict development in environmental areas to confer the benefit of environmental preservation on the general public. The taking implications of this kind of regulation came before the Court once before, in an historic landmark case that arose in New York City.<sup>15</sup> Historic landmark regulation puts restrictions on historic landmarks in order to confer the benefit of their preservation on the general public. The Court upheld the historic landmark law but adopted pragmatic balancing as the basis for reviewing taking claims rather than a per se rule.<sup>16</sup>

In this article I explore the impact of the *Lucas* decision on the duality of pragmatic balancing and categorical per se rules that has

---

8. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding state legislation requiring apartment owner to allow placement of cable box on roof without adequate compensation was a taking).

9. 112 S. Ct. 1522 (1992).

10. *Yee*, decided unanimously, was a sharp rebuff to conservative judges, appointed by Republican administrations, who aggressively extended the per se taking category in lower federal court decisions by holding that regulatory restrictions on the landlord-tenant relationship were the same as a physical taking. See, e.g., *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988).

11. 112 S. Ct. 2886 (1992).

12. *Id.* at 2900-01.

13. *Id.* at 2897.

14. See DANIEL R. MANDELKER, LAND USE LAW § 12.02 (2d ed. 1988).

15. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The Court had to consider whether a refusal to allow construction of a high-rise office building over Grand Central Station was a taking. The Court did not find a taking. *Id.* at 138.

16. *Id.*

confused taking doctrine. I also examine the effect of *Lucas* on the presumption of constitutionality that courts have historically applied in land use cases. I argue that the Court not only repealed a century of taking law, but also adopted a per se taking rule that protects property owners from excessive restriction, yet disregards government's legitimate interest in regulation. The saving grace of *Lucas* is that it will apply only to a limited number of land use cases. The problem is that the decision may have implications beyond its facts, and may mark a major and unwelcome turn in taking law. *Lucas* may have done more than kill a mouse.

#### I. THE LAW BEFORE LUCAS: PER SE RULES AND BALANCING TESTS

An understanding of *Lucas* must begin with the state of the Supreme Court's taking doctrine when it decided the case. One problem was that the Court had not developed a detailed body of taking law because it had decided only a few land use taking cases—most taking cases are decided in state courts.<sup>17</sup> The Supreme Court did not decide a major land use taking case, after its *Pennsylvania Coal Co. v. Mahon*<sup>18</sup> decision in 1922 until its 1978 decision in *Penn Central Transportation Co. v. City of New York*.<sup>19</sup> *Penn Central* is the case in which the Court held a taking did not occur when the city prohibited a high-rise office tower over Grand Central Station, a designated historic landmark.<sup>20</sup>

*Penn Central* is important in the development of land use taking law, especially since the *Lucas* case raised similar taking issues. As in *Lucas*, the owners of Grand Central Station were restricted in the use of their property, so that all of New York City, if not the nation, could enjoy the benefits of preserving an historic railroad station.<sup>21</sup> The difference is that there was an existing, economically beneficial use of the property in *Penn Central*.<sup>22</sup> The claim could not be made that the landmark designation and refusal to allow construction of

---

17. See MANDELMER, *supra* note 14, § 2.28. These courts, by and large, are favorably disposed to land use regulation, do not develop elegant taking theories, and mostly consider cases where land use regulations are challenged as they apply to a particular property. In a typical case, a municipality zones land for residential use, the property owner wishes to put the land to a commercial use, but the municipality refuses to rezone. The property owner then brings suit claiming the residential restriction in the zoning ordinance, as applied to his property, is a taking. A state court usually decides the case by determining whether the property as zoned could be put to a reasonable use, and in most states a taking occurs only if no economically viable use of the property is possible.

18. 260 U.S. 393 (1922).

19. 438 U.S. 104 (1978).

20. *Id.* at 138.

21. *Id.* at 134-35.

22. *Id.* at 136.

the high-rise office building deprived the landowners of all economically beneficial use.<sup>23</sup>

*Penn Central* adopted a taking test that requires a case-by-case pragmatic balancing of taking claims.<sup>24</sup> The Court identified a number of taking factors that courts are to consider in applying the balancing test to land use regulations.<sup>25</sup> These factors, the Court held, are not a "set" formula, but are to be considered in the case-by-case balancing required by the taking clause.<sup>26</sup> The Court explained:

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.<sup>27</sup>

The Court did not seriously address the taking questions raised by *Penn Central* until it decided its 1987 taking trilogy.<sup>28</sup> One of these cases, *Keystone Bituminous Coal Association v. DeBenedictus*,<sup>29</sup> upheld a statute prohibiting coal mining that causes subsidence. The Court effectively overruled the holding in *Pennsylvania Coal*,<sup>30</sup> sixty-five years earlier, that a similar statute was a taking of property.<sup>31</sup> *Keystone* is most remarkable for its confirmation of a two-part taking rule<sup>32</sup> radically different from the taking factors in the *Penn Central* balancing test,<sup>33</sup> even though the *Penn Central* factors

---

23. *Id.*

24. *Id.* at 124.

25. *Id.*

26. *Id.*

27. *Id.* The Court concluded: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citation omitted). On investment-backed expectations, see Daniel R. Mandelker, *Investment-Backed Expectations, Is There a Taking?*, 31 WASH. U.J. URB. & CONTEMP. L. 3 (1987).

28. See *supra* note 2. There has been extensive commentary on these decisions. See, e.g., Michael M. Berger, *Happy Birthday Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988); David L. Callies, *Property Rights: Are There Any Left?*, 20 URB. LAW. 597 (1988); Peter W. Salsich, *Keystone Bituminous Coal, First English, and Nollan: A Framework for Accommodation?*, 34 WASH. U.J. URB. & CONTEMP. L. 173 (1988).

29. 480 U.S. 470 (1987).

30. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

31. *Keystone*, 480 U.S. at 474.

32. *Id.* at 485.

33. The Court adopted this test in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), but it had not been taken seriously.

are noted in the decision.<sup>34</sup> The Keystone rule finds a taking if a regulation does not advance a legitimate government interest or leaves a landowner without an economically viable use of his land.<sup>35</sup> The Court did not indicate whether the Penn Central taking factors apply even if no economically viable use remains, nor did it explain the relationship between the two elements of the taking rule it adopted. It is not clear, for example, whether both elements of the rule must be present before a court can hold a taking has occurred.<sup>36</sup>

*Nollan v. California Coastal Commission*,<sup>37</sup> another 1987 taking case, partly answered this question. The Court held a taking occurred when the California Coastal Commission required a property owner to grant an easement of passage across a coastal beach, as a condition to a permit authorizing the rebuilding of a beach-front home.<sup>38</sup> The economic impact of this requirement was minimal, amounting to no more than "footprints in the sand."<sup>39</sup> Yet the Court found a taking<sup>40</sup> because the Commission's reason for requiring the easement was not justified by the purposes of the state Coastal Act.<sup>41</sup> Left unresolved, as the Term ended, was the outcome to be expected if a land use regulation advanced a legitimate governmental interest, but deprived a landowner of all economically viable use of his property. The *Lucas* case raised this issue.<sup>42</sup>

## II. THE LUCAS DECISION: PER SE RULES AND BALANCING TESTS

### A. *The Facts and Posture of the Case*

*Lucas* arose on the beaches of South Carolina, rather than in the office canyons of New York City, but the issue is the same. In a

---

34. *Keystone*, 480 U.S. at 516.

35. *Id.* at 485. The requirement that a land use regulation advance a legitimate state interest is identical to a comparable test that must be met to satisfy substantive due process requirements. This duplication is difficult to understand. It created difficulties in *Lucas*, where it was argued that compliance with the legitimate interest test was sufficient to meet any objections under the taking clause. *Lucas*, 112 S. Ct. at 2897.

36. *Keystone*, 480 U.S. at 485. At other points the Court indicated that denial of all economically viable use would be enough, at least in a facial taking challenge. See, e.g., *id.* at 495.

37. 483 U.S. 825 (1987).

38. *Id.* at 842.

39. *Id.* at 849.

40. *Nollan*, 483 U.S. at 841.

41. California Coastal Act of 1976, CAL. PUB. RES. CODE §§30000-30011 (West 1986).

42. *Lucas*, 112 S. Ct. at 2890.

Beachfront Management Act,<sup>43</sup> the state protected coastal beachfront areas by prohibiting new construction in a coastal setback area known as a "dead zone."<sup>44</sup> The dead zone is the area seaward of an established baseline connecting the landwardmost points of erosion during the past forty years.<sup>45</sup> Lucas was not allowed to build on two beachfront lots he owned in the dead zone that were situated between two existing dwellings.<sup>46</sup> He brought suit claiming a taking of property.<sup>47</sup>

The special circumstances of this taking claim lend a particular character to the decision and critically determine its effect on taking law. One is that Lucas conceded the purpose of the Act as a legitimate exercise of regulatory power, but claimed the building prohibition was a taking because it left him without an economically viable use of his land.<sup>48</sup> The trial court agreed, and awarded compensation.<sup>49</sup> On appeal, the South Carolina Supreme Court reversed.<sup>50</sup> Relying on taking doctrine established in early Supreme Court cases, the South Carolina court held that compensation is not payable when a regulation restricting property is designed "to prevent serious public harm."<sup>51</sup>

A second important circumstance is that the Beachfront Management Act, at the time Lucas bought his lots, contained no exceptions.<sup>52</sup> Its prohibition on building seaward of the baseline was absolute. After briefing and argument before the South Carolina Supreme Court, but before its decision, the legislature amended the Act to authorize the granting of permits in "special circumstances" for construction in the dead zone.<sup>53</sup> Had the permit option been available when Lucas bought his lots, his case would not have been "ripe" for decision.<sup>54</sup> Supreme Court ripeness rules require a litigant to apply for any available permit that would allow the development of her property.<sup>55</sup>

---

43. Beachfront Management Act, S.C. CODE ANN. §§ 48-39-250 to 48-39-360 (Law Co-op. Supp. 1992).

44. S.C. CODE ANN. § 48-39-290(A) (Law Co-op. Supp. 1992).

45. S.C. CODE ANN. § 48-39-280(A)(2) (Law Co-op. Supp. 1992).

46. *Lucas*, 112 S. Ct. at 2889.

47. *Id.* at 2890.

48. *Id.*

49. *Id.*

50. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991).

51. *Id.* at 896.

52. *Lucas*, 112 U.S. at 2889.

53. S.C. CODE ANN. § 48-39-290(D)(1) (Law Co-op. Supp. 1992).

54. *Lucas*, 112 S. Ct. at 2891.

55. Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1989).



The Supreme Court decided, nonetheless, that the taking claim was ripe for decision because the state court had not based its decision on ripeness grounds.<sup>56</sup> Whether or not this disposition of the ripeness issue was correct, the *Lucas* case, as the Court defined it, was limited to a very narrow question. This question is whether an absolute restriction on development, imposed without exception, is a taking when the restriction deprives the property owner of all economically beneficial use.<sup>57</sup> Moreover, the Court considered only the question of whether a taking occurred during the temporary period when the absolute prohibition was in effect.<sup>58</sup> Left open was the question of whether a taking occurs when a regulation that enacts a permanent restriction on development provides an opportunity for development to occur, through a special permit or similar procedure.<sup>59</sup>

### B. The Holding

The Court, in a majority decision by Justice Scalia, held a taking had occurred.<sup>60</sup> It created a new per se taking rule for cases, like *Lucas*, in which a land use regulation deprives a property owner of all economically beneficial use of his land.<sup>61</sup> This category of cases was subject to a taking rule, but it had not been clear whether the rule applied per se. This doubt is now removed. *Lucas* was governed by the established "categorical" taking rule that when a property owner has sacrificed "all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."<sup>62</sup>

The Court also held the South Carolina court erred in adopting the harmful use principle as the basis for its decision.<sup>63</sup> That principle was merely an "early attempt" to describe the reach of government regulation, and is replaced today by "our contemporary understanding of the broad realm within which government may regulate without compensation."<sup>64</sup> The "harmful or noxious use"

---

56. *Lucas*, 112 S. Ct. at 2890-92.

57. *Id.* at 2890.

58. *Id.* at 2891-92.

59. See, e.g., *Lackman v. Hall*, 364 A.2d 1244 (Del. Ch. 1976) (invalidating law authorizing mapping of corridor for future highways in which development was prohibited unless permit issued).

60. *Lucas*, 112 S. Ct. at 2895.

61. *Id.* at 2894-95.

62. *Id.* at 2895 (emphasis in original). Justice Scalia uses the phrase "reasonably beneficial" most frequently in his opinion, but he sometimes adds the alternative of "productive use," e.g., *id.* at 2893, and occasionally substitutes the phrase "economically viable" for "economically beneficial," e.g., *id.* at 2896.

63. *Id.* at 2897.

64. *Id.* at 2897.

concept may not be used to determine when a regulation is a taking, especially when the distinction between harm-preventing and benefit-conferring regulation is subjective and untenable.<sup>65</sup> With these words, Justice Scalia laid to rest the harm-benefit rule, a time-honored rule in taking law that also operated per se.<sup>66</sup>

Having held a regulation is a per se taking if it denies a landowner all economically beneficial use of his land, even though the purpose of the regulation is legitimate, Justice Scalia proceeded to state an exception: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."<sup>67</sup> Justice Scalia provided examples of his nuisance exception to guide courts in future litigation. One interesting case is his hypothetical of a lake bed owner who is denied a permit to engage in landfilling operations that would flood the land of others. This permit denial does not attract compensation.<sup>68</sup>

This exception validates land use regulations that deprive a landowner of all economically beneficial use if the restricted use would have been a nuisance at common law.<sup>69</sup> The exception injects pragmatic balancing into the new per se rule because a balancing of the benefits of a land use against the harms it creates is a time-honored hallmark of nuisance law.<sup>70</sup> On remand from the Supreme Court, the South Carolina Supreme Court decided a taking had occurred and remanded to the trial court to determine compensation.<sup>71</sup>

The *Lucas* case will attract attention because it is such a radical break with tradition in taking law. Commentators may focus on issues such as whether the Court's new per se rule applies to near-total as well as total takings,<sup>72</sup> and on how far the nuisance exception extends. The importance of the case is what it does to taking law, no matter how narrowly the holding applies. One significant change is the Court's surprising rejection of the per se harm-benefit

---

65. *Id.* at 2897-99.

66. *Id.*

67. *Id.* at 2900.

68. *Id.*

69. *Id.* at 2901.

70. See MANDELKER, *supra* note 14, § 2.11.

71. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992).

72. *Lucas*, 112 S. Ct. at 2895 n.8; see, e.g., Barry M. Hartman, *Lucas v. South Carolina Coastal Council: The Takings Test Turns a Corner*, 23 ENVTL. L. REP. 1003 (1993); Barry I. Pershkov & Robert F. Houseman, *In the Wake of Lucas v. South Carolina Coastal Council: A Critical Look at Six Questions Practitioners Should be Asking*, 23 ENVTL. L. REP. 1008 (1993). For critical perspective on *Lucas*, see Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. (forthcoming 1993).

rule that holds a land use regulation is a taking if it confers a public benefit, rather than prevent a harm.<sup>73</sup>

The most important change *Lucas* makes is to intensify the dualism between a taking test that requires pragmatic balancing, and a taking test that requires the application of categorical per se rules. The Court has not always been aware of this dualism and has used both taking tests interchangeably.<sup>74</sup> This indifference may not be possible after *Lucas*, which makes clear distinctions between per se rules and pragmatic balancing.

### III. A CRITIQUE OF THE LUCAS DECISION

#### A. *Rejection of the Harm-Benefit Rule*

Justice Scalia's resounding and correct rejection of the harm-benefit rule in *Lucas* concluded a major debate in taking jurisprudence.<sup>75</sup> The harm-benefit rule states that a per se taking occurs whenever a land use regulation confers a benefit on the general public, and would seem to hold that this type of regulation is a per se taking. The Court could have applied the harm-benefit rule in *Lucas*. It could have concluded the dead zone prohibition conferred a benefit on the general public by protecting environmentally important areas.

The harm-benefit rule had its origins in academic scholarship,<sup>76</sup> but its place in Supreme Court taking jurisprudence was problematic. The Court never explicitly adopted the rule, but, in a series of early cases, rejected taking claims arising out of regulations that prohibited one of two conflicting land uses when one harmed the other. These are the cases the South Carolina court relied on, in its *Lucas* decision.<sup>77</sup> The most important of these early cases, *Hadacheck v. Sebastian*, rejected a taking claim when a municipal ordinance prohibited the making of bricks at a brickyard, because the brickyard harmed the surrounding residential area.<sup>78</sup> The Court reached this result even though the brickyard was in operation before the surrounding residential area had been developed.<sup>79</sup>

---

73. *Lucas*, 112 S. Ct. at 2899.

74. See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987) (applying pragmatic balancing to hold federal statute providing for escheat to state of Indian lands held in fractionated title was a taking).

75. *Lucas*, 112 S. Ct. at 2897-99.

76. E.g., ERNST FREUND, *THE POLICE POWER* 546-47 (1904).

77. See *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 899 (S.C. 1991).

78. 239 U.S. 394, 411 (1915).

79. *Id.* at 408-10.

What these cases meant for taking law was never clear, but they were usually explained as harmful or noxious use cases.<sup>80</sup>

The harm-benefit rule figured prominently in *Penn Central*.<sup>81</sup> The owners of Grand Central Station attempted to distinguish *Hadacheck* and similar cases by arguing a taking occurred because they were uniquely burdened by the landmark designation.<sup>82</sup> They argued that the regulation in each of these cases prevented a noxious use of land, but that the noxious use theory on which the Court upheld these regulations did not apply because the office building they proposed was beneficial rather than harmful. Justice Brennan answered this argument for the Court:

[T]he uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. . . . These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.<sup>83</sup>

*Penn Central* qualified, but did not eliminate, the harm-benefit rule. Justice Brennan simply took the position that early cases like *Hadacheck* upheld regulations that conferred a public benefit.<sup>84</sup> This is not a correct interpretation. Even if it is, it created more problems than it solved because, under the harm-benefit rule, a regulation that confers a public benefit should be held a taking.<sup>85</sup>

Whatever the *Penn Central* holding on the harm-benefit rule, the issue arose once more in *Lucas*.<sup>86</sup> The reason is that land use regulations most likely to fall under the harm-benefit rule are regulations, as in *Lucas*, that impose a total restriction on land use to achieve widespread environmental benefits for the general public. In these cases, the economic impact of the regulation is likely to be the deciding factor in the taking claim, because environmental protection secures widespread judicial approval as a legitimate governmental purpose.<sup>87</sup> No doubt this is why *Lucas*

---

80. See, e.g., Corwin W. Johnson, *Compensation for Invalid Land-Use Regulations*, 15 GA. L. REV. 559 (1981).

81. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

82. *Id.* at 133-34 n.30.

83. *Id.*

84. *Id.* at 133.

85. Some courts took this view. See, e.g., *State v. Johnson*, 265 A.2d 711 (Me. 1970) (state wetland statute held a taking).

86. See *Lucas*, 112 S. Ct. at 2897-98.

87. See, e.g., *Garner v. New Jersey Pinelands Comm'n*, 593 A.2d 251 (N.J. 1991) (upholding restriction on development of agricultural land in New Jersey Pinelands).

conceded the validity of the Beachfront Management Act's regulatory objectives.<sup>88</sup>

Nonetheless, Justice Scalia saw fit to reject the harm-benefit rule in *Lucas*, concluding it was silly to continue this distinction in taking jurisprudence.<sup>89</sup> The distinction, he held, is illusory, as a regulation may have both purposes, depending on the perspective from which it is viewed.<sup>90</sup> The restriction in *Lucas*, Scalia pointed out, could be described as necessary to prevent harm to the state's ecological resources or to achieve the benefits of an ecological preserve.<sup>91</sup>

Justice Scalia's rejection of the harm-benefit rule is puzzling. Not only is it a *per se* rule, which he approves,<sup>92</sup> but it favors landowners in their taking clause battles.<sup>93</sup> With the demise of the harm-benefit rule, regulations that do not deprive a landowner of all economically beneficial use are presumably reviewable under the pragmatic balancing test. Courts are apparently free to approve governmental purposes when they apply pragmatic balancing that are much broader than those the harm-benefit rule allowed.<sup>94</sup> The result is that *Lucas* allows courts to reject, not approve, taking claims in the vast majority of land use cases in which they are likely to arise.<sup>95</sup>

#### B. The *Per Se* Total Take Rule and How It Affects Taking Law

Justice Scalia resolved an undecided issue in taking law by holding the economic impact of a land use regulation not only is a critical factor in taking analysis, but that total economic deprivation requires a *per se* rule of invalidity.<sup>96</sup> This is a major change in taking law because the precise role to be played in taking jurisprudence by the impact of a land use regulation on property values had not been clear. The difficulty began with the early *Pennsylvania Coal* decision, which held a land use regulation is a

---

88. *Lucas*, 112 S. Ct. at 2890.

89. *Id.* at 2897-98.

90. *Id.*

91. *Id.*

92. See *supra* notes 63-73 and accompanying text.

93. The harm-benefit rule favored landowners for two reasons. One was that it allowed a court to hold a regulation was a taking even though economic deprivation was minimal. Another was that it required a restricted view of governmental purpose limited to harm prevention.

94. See, e.g., *Lucas*, 112 S. Ct. at 2919 (Stevens, J., dissenting).

95. *Id.*

96. *Id.* at 2895.

taking if it goes "too far" but did not specify how "far" a regulation must go before a taking occurs.<sup>97</sup>

The choice lies between a rule that a taking occurs if there is a diminution in property value which is substantial but less than total, and a rule that a taking occurs only if the deprivation of economic use is total. The second rule is clearly the majority in the state courts,<sup>98</sup> but its status in the Supreme Court had not been clear prior to *Lucas* and even that case leaves questions unanswered.

The first step in this review is to return to *Penn Central*.<sup>99</sup> Recall that plaintiffs in this case opposed the designation of Grand Central Station as a landmark, and attacked the city's refusal to allow the construction of a high-rise office building over Grand Central Station.<sup>100</sup> Plaintiffs argued the refusal was a taking because it "significantly diminished the value of the Terminal site."<sup>101</sup> This argument invoked the substantial diminution rule as the test for a taking. Plaintiffs then weakened their case by conceding that "decisions sustaining other land-use regulations reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a taking."<sup>102</sup> The decisions cited here are *Hadacheck v. Sebastian*, discussed earlier,<sup>103</sup> and *Village of Euclid v. Ambler Realty Co.*,<sup>104</sup> which upheld the constitutionality of comprehensive zoning.

What plaintiffs argued was that these other regulations, such as zoning, are not a taking even under the substantial diminution rule because the burdens of regulation are imposed on all affected property, such as property restricted to residential use in a residential zoning district.<sup>105</sup> Historic landmark legislation is "fundamentally different" from these other regulations, they argued, because "the controls apply only to individuals who own selected properties."<sup>106</sup> Justice Brennan did not answer this argument directly. He simply held that the plaintiffs' argument had "no merit" because it makes any restriction on an historic landmark a

---

97. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

98. MANDELKER, *supra* note 14, § 2.32.

99. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

100. *Id.* at 119. The Court also considered a facial, as well as an applied, taking challenge to the ordinance.

101. *Id.* at 131.

102. *Id.*

103. *See supra* 76-80 notes and accompanying text.

104. 272 U.S. 365 (1926).

105. *Penn Central*, 438 U.S. at 131.

106. *Id.* at 131. Plaintiffs also distinguished historic district legislation, which is like zoning because it applies regulatory controls to buildings within an entire district. *Id.*

taking.<sup>107</sup> The result is that the Court's views on whether a total deprivation is required for a taking were left unclear.

The issue received more explicit attention in Chief Justice (then Justice) Rehnquist's dissent. He disagreed with the City of New York's argument that "a taking only occurs where a property owner is denied *all* reasonable value of his property."<sup>108</sup> Rehnquist would have held a taking occurs whenever the damage to property is substantial.<sup>109</sup> He went further and in a footnote took issue with the requirement that a total denial of all economic return was essential to a successful taking claim:

Difficult conceptual and legal problems are posed by a rule that a taking only occurs where the property owner is denied all reasonable return on his property. Not only must the Court define "reasonable return" for a variety of types of property . . . but the Court must define the particular property unit that should be examined.<sup>110</sup>

These issues reappeared in *Lucas*. No Justice quoted Rehnquist's *Penn Central* dissent, but his criticisms returned to haunt Justice Scalia's *per se* taking rule. Justice Scalia admitted, as Rehnquist argued, that defining the property interest to determine whether a total deprivation has occurred will not always be easy.<sup>111</sup> Take, for example, a zoning ordinance establishing a front yard setback on residential property. Does the setback requirement sever the property so that the restriction on building within the setback is a total deprivation of all economically beneficial use within the setback area? Justice Scalia did not answer that question.<sup>112</sup>

Justice Scalia also was compelled to answer a criticism by Justice Stevens in his dissenting opinion that the *per se* rule is arbitrary because a landowner whose land is diminished in value 95% recovers nothing, while the landowner who suffers a full deprivation receives full compensation.<sup>113</sup> Justice Scalia answered that compensation might still be payable even though the "deprivation

---

107. *Id.*

108. *Id.* at 149 (dissenting opinion).

109. *Id.* at 149-50 (dissenting opinion). Justice Rehnquist quoted the following statement from *United States v. Cress*, 243 U.S. 316, 328 (1917): "[I]t is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id.*

110. *Id.* at 149 n.13.

111. *Lucas*, 112 S. Ct. at 2894 n.7.

112. *Id.*

113. *See Id.* at 2919 (dissenting opinion).

is one step short of complete."<sup>114</sup> That concession creates a penumbra of near-total takings that will no doubt confound courts.

Untangling these complexities will have to be left to future decisions. Chief Justice Rehnquist got it right the first time. A "total take" of property through land use regulation is difficult to define.<sup>115</sup> Turning the application of a severe per se taking rule on elusive calculations of total economic deprivation is not the way to apply the taking clause to land use regulation.<sup>116</sup> That Justice Scalia so forcefully created a per se taking rule for a limited category of land use cases suggests he may have been more interested in revising the analytic language of taking jurisprudence than in deciding the facts of the case.

The biggest surprise is that, despite this display of intellectual artillery, the distinction between a land use regulation that causes a "diminution" in property value and one that causes a deprivation of all economically beneficial use remains muddled. *Penn Central* appears to hold that mere diminution can never be a taking and that total deprivation is required.<sup>117</sup> *Lucas* goes one step farther and holds, not only that a total deprivation is a taking, but that it is a taking per se.<sup>118</sup> Whether a category of diminution cases remains in which a regulation is not a taking per se but might be a taking through application of pragmatic balancing is not clear. Justice Scalia indicated in a footnote that a distinction remains between the total deprivation and diminution cases, but he did not indicate whether diminution would be enough for a taking if it were substantial.<sup>119</sup>

### C. An Attack on the Presumption of Constitutionality

Another important feature of the *Lucas* decision is its attack on the presumption of constitutionality.<sup>120</sup> No dogma is more thoroughly enshrined in land use law.<sup>121</sup> The *Euclid* decision, in which the Court upheld comprehensive zoning early in this century, is the seminal case.<sup>122</sup> The plaintiff challenged a zoning ordinance

---

114. *Id.* at 2895 n.8.

115. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 149 n.13 (1978) (Rehnquist, J., dissenting).

116. Professor Michelman has examined the problem of "conceptual severance" in takings law. Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988).

117. *Penn Central*, 438 U.S. at 131.

118. *Lucas*, 112 S. Ct. at 2895.

119. *Id.* at 2894 n.7.

120. *Lucas*, 112 S. Ct. at 2909 (Blackmun, J., dissenting).

121. Justice Blackmun described the presumption of constitutionality as "one of this Court's oldest maxims." *Id.* See generally MANDELKER, *supra* note 14, § 1.13.

122. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).



that excluded apartments from residential districts and claimed the exclusion did not serve a legitimate governmental purpose.<sup>123</sup> The Court held it did. Its endorsement of the presumption of constitutionality was loud and clear: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."<sup>124</sup>

Recent years have witnessed severe erosion of the presumption of constitutionality in a wide variety of land use cases. These include cases that implicate important constitutional rights, such as free speech,<sup>125</sup> and that affect vulnerable land use interest, such as group homes.<sup>126</sup> In these cases the courts quite properly shift the presumption of constitutionality against government because more stringent judicial review is required to invalidate excessive regulation.<sup>127</sup>

The presumption of constitutionality continued to apply in taking cases despite these changes in presumption availability. The Court confirmed the presumption in its 1987 *Keystone* decision, at least as it governs judicial review of governmental purpose,<sup>128</sup> although a footnote in its *Nollan*<sup>129</sup> decision, from the same term, casts some doubt on its strength. Justice Scalia suggested that the reasonably debatable rule required by the presumption in the review of governmental purpose should be abandoned for a more rigorous judicial scrutiny.<sup>130</sup> Just how serious Justice Scalia was in making this suggestion, and how far it applies, are not clear.<sup>131</sup>

The presumption issue came up again in *Lucas* because of the exception the Court adopted to its categorical per se rule. As noted earlier, the Court held that even a total deprivation of economic use is not a taking if the land use proposed by the landowner would have been a common law nuisance.<sup>132</sup> This holding

---

123. *Id.* at 386.

124. *Id.* at 388.

125. See MANDELKER, *supra* note 14, § 2.41.

126. See MANDELKER, *supra* note 14, §§ 5.04 - 5.07.

127. See generally Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992).

128. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987). Note that the inquiry into legitimate purpose in a taking case resembles the comparable inquiry conducted under substantive due process. This is another of those unexplainable confusions in taking law, as it is difficult to see why a purpose inquiry is necessary as part of taking analysis when a substantive due process inquiry accomplishes the same objective.

129. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 n.3 (1987).

130. *Id.*

131. See, e.g., *Blue Jeans Equities West v. City & County of San Francisco*, 4 Cal. Rptr. 2d 114 (Cal. App. 1992) (*Nollan's* heightened standard of judicial review applies only to regulatory takings, not impact fees).

132. *Lucas*, 112 S. Ct. at 2900.

radically modifies the presumption of constitutionality.<sup>133</sup> Before *Lucas*, the legislature had the authority to declare what is and what is not in the public interest, and this declaration was presumptively constitutional.<sup>134</sup> Now, as Justice Scalia made plain in *Lucas*,<sup>135</sup> the courts will determine whether a total deprivation is defensible under the taking clause by applying nuisance law.<sup>136</sup> The presumption is reversed, if not discarded, because legislative declarations of governmental purpose have no standing in the decision on a taking claim.

Certain truths had previously been held inviolate. One was that legislatures could modify the judicially-crafted law of nuisance that governed land use conflicts in the days before land use regulation.<sup>137</sup> Although courts sometimes invoked the maxim that "a law may not declare that to be a nuisance which was not a nuisance at common law,"<sup>138</sup> the maxim had no real bite and most courts refused to follow it.

This was clear as early as the Court's decision in *Hadacheck*, where the Court held brick making could be prohibited even though, at common law, it was not clear a court would have enjoined it as a nuisance in that case.<sup>139</sup> The problem was that the brickyard located in the neighborhood first, and there is respectable doctrine that a court will not enjoin a nuisance when the complaining landowner "came" to the nuisance.<sup>140</sup> This situation occurs, as in *Hadacheck*, when the nuisance sought to be enjoined was there first and enjoys priority of occupation. The "coming to the nuisance" rule is not absolute and may not be the majority rule, but the importance of *Hadacheck* is its disregard of that rule and its assumption that the legislature could declare that to be a nuisance which was not a nuisance at common law.<sup>141</sup>

---

133. *Lucas*, 112 S. Ct. at 2909 (Blackmun, J., dissenting).

134. See MANDELKER, *supra* note 14, § 1.13.

135. This is my conclusion. Justice Scalia chided Justice Blackmun for arguing the majority decision put the burden on the state to show a regulation was not a taking. Justice Scalia replied that "[o]ur analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule-with-exceptions presumes the invalidity of a law that violates it—for example, the rule generally prohibiting content-based restrictions on speech." *Lucas*, 112 S. Ct. at 2893-94 n.6.

136. Justice Scalia stated that a regulation that effects a total taking may be saved only if it does no more than what could have been achieved "in the courts" through the law of private or public nuisance. *Id.* at 2900.

137. The historical context is discussed at length in Justice Blackmun's dissent. *Id.* at 2912-17.

138. See *Id.* at 2914 (Blackmun, J., dissenting).

139. *Hadacheck v. Sebastian*, 239 U.S. 394, 406-07 (1915).

140. See MANDELKER, *supra* note 14, § 4.04.

141. *Hadacheck*, 239 U.S. at 413-14.

Indeed, the Court did not bind land use regulators to the limits of nuisance law in the landmark *Euclid* case in which the Supreme Court held zoning constitutional. The law of nuisance, the Court held, "ordinarily will furnish a fairly helpful clew [sic]"<sup>142</sup> to land use regulation, but regulators could clearly go beyond it.<sup>143</sup> The presumption of constitutionality was confirmed in this holding.

Just how forcefully Justice Scalia departed from the traditional majority view in *Lucas* is evident in his rejection of the South Carolina legislature's statutory findings that justified the imposition of a coastal setback: "A *fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated."<sup>144</sup> Dissenting opinions of Justice Blackmun<sup>145</sup> and Justice Stevens<sup>146</sup> took strong objection to this fundamental change in an established constitutional principle.

The argument here is not that legislative declarations of governmental purpose should be always be exempt from more stringent judicial review through presumption reversal. The argument is that Justice Scalia repealed a century of land use law by shifting the authority to determine what is a legitimate governmental purpose from the legislatures to the courts. Although excesses may occur in governmental regulation of land use, the answer is not to cripple legislative oversight by completely eliminating the role of the legislature in defining the limits of governmental intervention.<sup>147</sup>

---

142. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

143. *Id.* at 388.

144. *Lucas*, 112 S. Ct. at 2899.

145. Justice Blackmun stated: "The South Carolina Supreme Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports with one of this Court's oldest maxims: 'the existence of facts supporting the legislative judgment is to be presumed.'" *Id.* at 2909 (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938)).

146. Justice Stevens stated:

The Court's holding today effectively freezes the State's common law, denying the legislature much of its traditional power to revise the law governing the rights and uses of property. Until today, I had thought that we had long abandoned this approach to constitutional law. More than a century ago we recognized that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

*Id.* at 2921 (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1877)).

147. One reason for this change may have been that severe economic deprivation in the use of land is likely to occur most often in environmental regulation, where courts are most likely to approve the purposes of governmental intervention. See, e.g., *First Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893 (Cal. App. 1989), cert. denied, 493 U.S. 1056 (1990) (holding floodplain ordinance not a taking on remand from Supreme Court decision holding compensation is payable for takings in land use cases).

*D. Harm-Benefit and Balancing Redux*

This radical revision of taking law might at least have made sense had it been consistent, but the trouble is that Scalia turned full circle in his *Lucas* opinion. As Justice Blackmun pointed out in his dissent, Justice Scalia's nuisance exception to the categorical per se rule for total takings does not escape the "trap" of the harm-benefit rule he so scornfully rejected, because nuisance law is based on the harm concept.<sup>148</sup> In the typical land use nuisance case there is an intruding and a defending land use.<sup>149</sup> The defending land use claims the intruding land use is harmful because it is not compatible with existing uses in the area. An extreme example is a slaughterhouse in a residential neighborhood. The residential neighborhood defends; the slaughterhouse intrudes.<sup>150</sup>

The courts for centuries granted injunctions in nuisance cases against intruding uses by applying the "prevention of harm" or "noxious use" theory Justice Scalia derides.<sup>151</sup> Courts may now exempt land use regulations that effect total takings from the per se rule by applying the same harmful use rule that governs nuisance cases.<sup>152</sup> The only difference is that the decision on what is noxious or harmful, and so subject to regulation without compensation, is to be made by the courts without legislative intervention.<sup>153</sup> If this is the result of the *Lucas* case, then the presumption of constitutionality has been reversed and the law of takings transfigured.<sup>154</sup>

Justice Scalia was adamant on the need for a per se taking rule to decide cases of total deprivation.<sup>155</sup> Yet he adopted a nuisance exception that invokes an equity regime in which balancing of interests is the hallmark of decision making. Courts commonly balance the interest of the property owner in the use he proposes against the harm to other landowners that will occur and the effect on the general public of prohibiting the intended use.<sup>156</sup> Justice Scalia was aware that this kind of balancing occurs in nuisance law.<sup>157</sup> The result of *Lucas*, then, is a per se taking rule qualified by an exception that requires pragmatic balancing. The difference is that the balancing done by the courts is to determine whether

---

148. *Lucas*, 112 S. Ct. at 2913 (Blackmun, J., dissenting).

149. See MANDELKER, *supra* note 14, § 4.05.

150. See generally MANDELKER, *supra* note 14, §§ 4.02-4.15.

151. See MANDELKER, *supra* note 14, §§ 4.11-4.13.

152. *Lucas*, 112 S. Ct. at 2900-01.

153. *Id.* at 2899.

154. A reversal of the presumption of constitutionality has been one of the most important developments in land use law in recent years. See Mandelker & Tarlock, *supra* note 127.

155. *Id.* at 2895.

156. See MANDELKER, *supra* note 14, § 2.11.

157. *Lucas*, 112 S. Ct. at 2901.

nuisance law applies, rather than to determine whether the legislative declaration of a land use restriction is constitutionally acceptable.<sup>158</sup>

#### IV. IMPLICATIONS: WHAT A "TRUE ACCOUNT" REALLY SHOWS

*Lucas*, on its facts, is a narrow decision. The new categorical per se taking rule applies only when a regulation accomplishes a total deprivation of all economically beneficial use of the affected land.<sup>159</sup> These cases are likely to be small in number if the per se category is not extended to less than total deprivations, although wetlands regulations are likely targets of taking attacks even under the *Lucas* per se rule. Even when a total take does occur, a court may well decide after *Lucas* that principles of nuisance law justify the regulation or that the landowner did not have a property interest entitled to protection.<sup>160</sup>

The more sinister aspect of the *Lucas* case is the analytical methods it used in reaching its decision. *Lucas* is another of those decisions implicitly taking a dyadic perspective on the taking issue. Professor Daniel Bromley has defined this perspective. "The fatal flaw in the extreme form of this dyadic view is that the existence and empirical content of property rights is simply assumed—or rather asserted—and the only job remaining is to determine the correct level of compensation whenever some governmental action interferes with the presumed property rights."<sup>161</sup>

This position is especially clear in the writings of Professor Richard Epstein<sup>162</sup> and others, who take the view that property is a right entitled to absolute protection from governmental restriction. *Lucas* reinforces this view because it equates a total deprivation of all value under a regulatory program to a total physical take and holds this deprivation requires compensation.<sup>163</sup> This kind of uncompromising analysis could be extended to other kinds of regulatory losses, such as less than total deprivations, or perhaps to regulatory programs whose purposes are thought undeserving of taking clause protection.

---

158. *Id.* at 2901-02.

159. *Id.* at 2901.

160. See, e.g., *Smith v. Town of Wolfeboro*, 615 A.2d 1252 (N.H. 1992) (finding protection of public health the purpose of subdivision regulations); *Stevens v. City of Cannon Beach*, 835 P.2d 940 (Or. App. 1992) (no taking in denial of permit to erect seawall because development would have interfered with public's use of dry sand area).

161. Daniel W. Bromley, *Regulatory Takings: Coherent Concept or Logical Contradiction?*, 17 VT. L. REV. (forthcoming 1993) (manuscript at 4, on file with the Vermont Law Review).

162. See, e.g., Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1.

163. 112 S. Ct. at 2895.

The Court's implicit acceptance of a dyadic view of the taking clause in *Lucas* is also reinforced by its adoption of yet another per se rule to decide taking claims. Professor Margaret Radin has noted that the dialectic in takings jurisprudence between per se rules and the pragmatic balancing of *Penn Central* "is simply an instance of what has been called the dialectic of rules and standards."<sup>164</sup> The *Lucas* per se rule falls in the rules category. Pragmatic balancing is an example of a standard. Radin argues that per se rules are a conservative trend on the broad level of the nature of law and the narrower level of property because the result is that "the extension of the word, the instances that the term will comprehend, must be definite and known by pre-existing rules."<sup>165</sup>

Radin also believes per se rules are congenial to conservatives because they provide a basis for judicial intervention that does not appear to require value judgment.<sup>166</sup> After *Lucas*, a court can protect property rights in cases it believes are a taking of all reasonable use just by applying the per se rule that requires compensation.

Although per se rules may serve to hide the necessity to make pragmatic value judgments, they do not always serve conservative ends.<sup>167</sup> The presumption reversals and prima facie case rules that occur in civil rights litigation provide a categorical foundation for judicial restriction of property rights that is much like a per se rule. Courts do this by basing findings of racial discrimination that restrict the right to control property on factual evidence that suggests a civil rights violation. This does not mean it is impossible to be a taking clause conservative and a civil rights liberal at the same time. It does mean that per se rules do not necessarily serve conservative ends.

An example is the prima facie case rule courts apply in cases where racial discrimination is claimed that violates the federal Fair Housing Act.<sup>168</sup> The rule establishes a prima facie statutory violation when a plaintiff introduces factual evidence from which a court can infer racial discrimination based on a racially discrimina-

---

164. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1681 (1988).

165. *Id.* at 1682. Professor Fred Bosselman pointed out to the author in conversation that even per se rules are not absolute because the categorical facts that trigger a per se rule must be defined. Under the *Lucas* per se taking rule, for example, courts will have to wrestle with what is total deprivation of "reasonably beneficial" use. There also was disagreement in *Lucas* over whether a reasonably beneficial use must include a "developmental" use to protect a regulation from invalidation under the taking clause. *Lucas*, 112 S. Ct. at 2895 n.8.

166. RADIN, *supra* note 164, at 1682.

167. For detailed exposition of the view that rules are not necessarily conservative, see Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

168. 42 U.S.C. §§ 3601-3611 (1988).

tory effect that violates the Fair Housing Act.<sup>169</sup> The defendant has the burden of coming forward with evidence to dispute this inference, but the prima facie case usually becomes absolute because the rigorous standard courts impose on rebuttal is seldom met. Much like the per se rule in *Lucas*, the prima facie case rule almost determines the result in Fair Housing Act cases. The difference is that property rights are restricted, not protected.

An important Second Circuit zoning case brought under the Act is an example.<sup>170</sup> It held plaintiffs made a strong prima facie case of racially discriminatory effect when they claimed a town engaged in racially discriminatory zoning by refusing to rezone land in an all-white neighborhood for federally-subsidized multi-family housing.<sup>171</sup> The court based its prima facie case finding on evidence that the zoning refusal perpetuated racial discrimination in the community and had a disproportionate effect on blacks.<sup>172</sup> The Court then held the town had not rebutted the prima facie case.<sup>173</sup>

Even though a per se rule does not always serve conservative ends, the adoption of a per se rule in *Lucas* continues the dualism that has marked constitutional law since the days of the Warren Court. In civil rights cases the Court applies doctrine that eases the road to proof that a statutory or constitutional violation has occurred. When property rights or other economic interests are affected, the Court has been more reticent. It has hidden behind the presumption of constitutionality and similar rules to protect government from assault under the taking and other constitutional limitations.

*Lucas* may indicate the Court is now more willing to resolve the tension in this constitutional dualism by favoring per se rules over pragmatic balancing. Certainly the philosophical antecedents and companions of the doctrines announced in *Lucas* support this conclusion. The Court adopted a categorical rule that protects property owners and prevents their exposure to the dangers of pragmatic case-by-case balancing under the *Penn Central* test.<sup>174</sup>

*Yee v. City of Escondido* indicates, of course, that the Court is not completely committed to the adoption of per se rules in taking

---

169. See MANDELKER, *supra* note 14, § 7.05.

170. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd*, 488 U.S. 15 (1988).

171. *Id.* at 938.

172. *Id.* In this case the court partly based its finding that a prima facie case had been proved on statistical evidence indicating the disproportionate number of blacks affected by the zoning refusal. *Id.*

173. *Id.* at 940.

174. *Lucas*, 112 S. Ct. at 2895.

cases.<sup>175</sup> In *Yee*, the Court refused to accept a categorical per se taking rule adopted by conservatives on the lower federal courts<sup>176</sup> by refusing to hold that a restriction on the property rights of mobile home park owners was a physical occupation.<sup>177</sup> *Yee* may just be a case in which conservatives on the Court believed its lower court comrades had gone too far.

Even so, *Lucas* may be more than a missile that killed the mouse of beachfront protection in a very narrow case, where the Court defined a tightly confined taking claim that might never occur again. A true account of *Lucas v. South Carolina Coastal Council* shows that the case stands for more than the particular facts it decided. *Lucas* may be a foretaste of doctrinal revision that substantially and improperly enhances the protection of property under the taking clause. If so, *Lucas* may turn out to be a destructive missile indeed.

---

175. 112 S. Ct. 1522 (1992).

176. E.g., *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988).

177. *Yee*, 112 S. Ct. at 1534.